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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 173

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL DAIRY PRODUCTS CORP., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court rendered no opinion in dismissing the counts of the indictment charging violations of Section 3 of the Robinson-Patman Act. The court's oral statement, made when it granted the motion to dismiss those counts, is set forth at R. 121–122.

JURISDICTION

The counts of the indictment involved in this appeal were filed under Section 3 of the Robinson-Patman Act, 49 Stat. 1525, 15 U.S.C. 13a. The order of the district court, dismissing these counts as based on an unconstitutional statute, was entered on March 20, 1961 (R. 122–123). The notice of appeal was

filed on April 15, 1961 (R. 124–125), and probable jurisdiction was noted on October 9, 1961 (R. 126). The jurisdiction of this Court rests on the Criminal Appeals Act, 18 U.S.C. 3731.

STATUTE INVOLVED

Section 3 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13a, provides as follows:

> *Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties.*
>
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.
>
> Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

QUESTION PRESENTED

Whether the provision of Section 3 of the Robinson-Patman Act making it a crime to sell goods at unreasonably low prices for the purpose of destroying competition, as applied to sales made below cost with such purpose, is unconstitutionally vague and indefinite.

STATEMENT

On September 16, 1959, the appellees were indicted in the United States District Court for the Western District of Missouri (R. 1–33). Eight counts (counts 1, 3, 5, 7, 9, 11, 12 and 14) charged National Dairy Products Corporation ("National") with conspiring to restrain trade in violation of Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 1; seven counts (counts 2, 4, 6, 8, 10, 13 and 15) charged it with making sales below cost for the purpose of destroying competition, in violation of Section 3 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13a. Two of the Sherman Act counts (counts 11 and 12) and one of the Robinson-Patman Act counts (count 13) named Raymond J. Wise, a vice-president and director of National, as a co-defendant.

The pertinent allegations of the indictment are as follows:

National is engaged in the business of purchasing, processing, distributing and selling milk and other dairy products throughout the United States (R. 1). For the past several years National, which has a milk processing plant in Kansas City, Missouri, has been in competition with national concerns and various

small local dairies, both in the Greater Kansas City area and in a number of smaller cities and towns adjoining Kansas City in Kansas and Missouri (R. 4). Each of the local dairies has only a single bottling plant and, typically, annual sales not exceeding $300,000 (R. 4). A number of local dairies have sales of less than $100,000 and net assets of less than $50,000 (R. 4). Throughout the Greater Kansas City market, National distributes its products largely through its own employees, but in the cities and towns in Missouri and Kansas outside this market it usually sells its milk in paper cartons to independent distributors who, in turn, resell the milk on their own account (R. 4). During the period covered by the indictment, National did not normally bottle milk in glass containers for sale in stores (R. 4–5).

The indictment charged violations of Section 3 of the Robinson-Patman Act with respect to National's direct or indirect sales of milk in Kansas City and six local markets in Missouri or Kansas. It alleged that during stated periods National sold milk through its distributors (or, in the case of the Greater Kansas City market, directly) at unreasonably low prices for the purpose of destroying competition in the market in question (R. 9, 12, 15, 18–19, 22, 28–29, 32). In each market, National is charged with having "utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it * * * by intentionally selling milk [directly or to its distributor in the area] at prices below National's

cost" (R. 10, 12, 15–16, 19, 22, 29, 32). The effect of such practices in two instances has been to "eliminate competition" and "to drive small dairies from" the market (R. 16, 32). In the other five areas, the actions of National have resulted in "severe financial losses to small dairies doing business" in the market and have caused them losses in sales volume (R. 9, 12, 19, 22, 29). In addition, the violations in the Greater Kansas City market (in which the defendant Wise participated as a principal (R. 28)), have forced some small dairies to request stores selling their products to refrain from advertising or selling them at low prices, in order to prevent National from starting a new price war (R. 29).[1]

On January 22, 1960, National moved to dismiss the seven Robinson-Patman Act counts on the ground that the statute is unconstitutionally vague; a similar motion was filed by the defendant Wise with respect to the Robinson-Patman Act count involving him. After hearing oral argument by the parties on March 6, 1961, the district court ruled from the bench that the statute "is so vague and indefinite as to violate the Constitutional provisions relating to due process"

[1] The Sherman Act counts charged violations relating to National's activities in the six specified local markets outside Greater Kansas City. It was alleged that in each case, during the same periods involved in the parallel Robinson-Patman Act counts, National's distributors were guaranteed a specific gross margin of profit, thus permitting the distributor to engage in price wars without risk of loss (see, *e.g.*, R. 7, 8); and that an objective and result of National's actions was to restrict or eliminate the sale of milk in glass gallon containers by the small dairies in these communities in competition with the milk sold by National or its distributors in paper cartons (*ibid.*).

(R. 122), and dismissed counts 2, 4, 6, 8, 10, 13 and 15. The formal order of dismissal (R. 122–123) was entered on March 20, 1961.[2]

SUMMARY OF ARGUMENT

I

A. The indictment charged that National intentionally sold milk below cost in seven markets for the purpose of destroying competition, and subsidized the price war by its operations in other areas. Such sales below cost are clearly within the prohibition in Section 3 of the Robinson-Patman Act against selling "at unreasonably low prices for the purpose of destroying competition."

The words "unreasonably low prices" plainly cover sales at prices below cost when made with the purpose of destroying competition. Businesses are run for profit and, according to normal standards of the business community, any price below cost is "unreasonably low" unless justified by the exigencies of a special situation. The basic purpose of the Robinson-Patman Act was to prevent predatory pricing practices which are destructive of competition. An obvious example of such practices is selling below cost by a large and powerful firm for the purpose of driv-

[2] The district court subsequently dismissed counts 11 and 12 as to appellee Wise, on the ground that a corporate official may not be prosecuted under Section 1 of the Sherman Act for antitrust violations committed in his corporate capacity, but only under Section 14 of the Clayton Act. The government has appealed to this Court from the dismissal of those counts as to Wise. *United States* v. *Wise*, No. 488, this Term, pending on Jurisdictional Statement.

ing a weaker firm out of business or forcing it to cease competing in price with the large firm.

The pernicious effect upon competition of predatory sales below cost has long been recognized by the courts. The legislative history of the original Clayton Act shows that Congress recognized that such selling below cost should be prohibited. In enacting the Robinson-Patman Act, Congress intended to strengthen the Clayton Act, and the legislative history of Section 3 of Robinson-Patman shows that Congress there intended to prohibit selling below cost for a predatory purpose.

B. As applied to the sales below cost charged in this indictment, Section 3 fully satisfies the constitutional requirement that a statute be sufficiently definite to give persons adequate warning of what conduct is criminal, and to provide judges and juries with adequate standards for identifying the proscribed conduct. This Court has recognized the need for generalized criteria in the antitrust field. Common usage and understanding are enough to inform business management that selling below cost constitutes selling at an unreasonably low price unless abnormal business circumstances compel operations at a loss; and they are enough to inform it that a purpose of destroying competition is not a valid justification. Many antitrust decisions have made clear the unreasonableness of predatory below-cost selling; the legislative history of Section 3 and its predecessor statutes shows the purpose of Congress to ban the practice. Businesses commonly are fully aware of the relationship of their prices to their costs,

and determination of the level of costs has never presented unfamiliar or insuperable problems of proof. Section 3, moreover, penalizes sales below cost only when they are made for the purpose of destroying competition, and this Court has often held that a statute is not too vague when it applies only to conduct motivated by a specific intent to accomplish a prohibited purpose.

Section 3 is no more indefinite than many other statutes which this Court has upheld against charges of unconstitutional vagueness. The use of such terms as "reasonable" or "unreasonable" has been held valid when, as Section 3 is here applied, they were comprehensible both to potential defendants and to the courts. The Court has also upheld as sufficiently definite other standards of criminality framed in general terms of no greater specificity than "reasonableness."

II

Since Section 3 is constitutional as applied to the sales below cost charged in this indictment, there is no occasion for the Court to consider its constitutionality as applied to other situations. A litigant may challenge the validity of a statute only as applied to him, and it has been this Court's consistent practice to decide constitutional questions only on the basis of the precise facts before it. If a statute is constitutional as applied, the Court will not look beyond the particular case before it to consider the statute's validity in other peripheral situations. Appellees' argument that Section 3 is invalid "on its face" is but another way of saying that its constitutionality should be determined

in the abstract, rather than as applied to the particular sales below cost here charged.

ARGUMENT

I

THE PROHIBITION IN SECTION 3 OF THE ROBINSON-PATMAN ACT AGAINST SELLING AT UNREASONABLY LOW PRICES FOR THE PURPOSE OF DESTROYING COMPETITION IS CONSTITUTIONAL AS APPLIED TO SALES BELOW COST FOR THAT PURPOSE

The counts of the indictment dismissed by the district court charged (1) that, for the purpose of destroying competition, appellee National intentionally sold milk in various markets at prices below its cost; and (2) that such sales were made in the course of a "price war against small dairies selling milk in competition with [National] and its distributor," which National had "finance[d] and subsidize[d]" with the "advantages it possesses by reason of the fact that it operates in a great many different geographical localities." (R. 9, 12, 15–16, 19, 22, 28–29, 32.) We submit that such sales below cost fall within the statutory prohibition in Section 3 of the Robinson-Patman Act against selling at unreasonably low prices for the purpose of destroying competition, and that, as applied to such sales, Section 3 is not unconstitutionally vague.

A. SECTION 3 OF THE ROBINSON-PATMAN ACT PROHIBITS SALES BELOW COST FOR THE PURPOSE OF DESTROYING COMPETITION

1. The third clause of Section 3 of the Robinson-Patman Act makes it a crime to sell goods

> at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Selling below cost in the absence of special circumstances is explicable only as part of a campaign to destroy competition; and it inevitably will have that effect. Small and weak concerns cannot hope to endure against a strong competitor who undertakes to sell at a loss. If such loss-selling is intended to stop price competition, the weak firms must either soon capitulate to the demands of the big competitor and raise their prices, or go under. If it is intended to drive the weak firms out of business, the plan is almost certain to succeed if the predatory price-cutter has sufficient economic strength to outlast his weaker rivals. The need or opportunity to destroy competition cannot be invoked as a justification which makes a price below cost reasonable. On the contrary, it is plain from the proscription of sales at unreasonably low prices "for the purpose of destroying competition or eliminating a competitor" that this element of gain to the seller is not a permissible factor in judging the question of reasonableness. Indeed, the seller's predatory intent is the very core of the illegal acts proscribed by Section 3.

The statutory words thus plainly cover sales at prices below cost when made with the purpose of destroying competition. Businesses are run for profit. Selling prices are ordinarily unacceptable if they fall below the level at which a business can operate profitably over any substantial period. Any price below cost is therefore "unreasonably low," according to normal standards of the business community, unless justified by the exigencies of a special situation.

These considerations were noted in *Ben Hur Coal Co.* v. *Wells*, 242 F. 481, 486 (C.A. 10), a private

treble damage action under Section 3. There the court recognized the "economic facts of life" that businesses do not "deliberately and consistently sell at a loss without some ulterior motive." It concluded that such sales below cost, made "without competitive compulsion," are at "unreasonably low prices," and that the seller "is vulnerable to the inference" that he had "the proscribed purpose of destroying competition or eliminating a competitor."[3]

To be sure, there are special situations where sales below cost have a legitimate commercial function. They may dispose of excess inventory, of obsolete or spoiling merchandise, or of merchandise in a line which the seller no longer wishes to produce or distribute; they may be made to introduce a new product or to break into a new market; or they may be designed to retain a customer by meeting in good faith the equally low price of a competitor. But as long as such sales are not designed to destroy competition or eliminate a competitor, they are not prohibited by Section 3. Where, however, there is no valid business justification for sales below cost—the situation presented in the present case, since the indictment charges that the sales were made to destroy competition—they constitute a particularly aggravated threat to competition. They are precisely the kind of anticompetitive practices that Congress considered to pose so serious a

[3] The *Ben Hur* case (and other private actions under section 3 cited in this brief) were decided before this Court held, in *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, that a private action cannot be maintained for violation of that section.

threat to our economy as to warrant the imposition of criminal penalties (see *infra,* pp. 12–17). They plainly constitute sales at "unreasonably low prices" under Section 3.

The clear application of the statute to sales below cost cannot be obscured by the conceptual problems that arise in applying the phrase "unreasonably low prices" in other situations. For example, the determination whether particular prices are "unreasonably low" may be made solely on a dollars and cents basis—that is, by examining the relationship between such prices and the seller's costs, the seller's normal price structure, and the general price levels in the market or industry. Under this theory, a price might be unreasonably low yet not be illegal because the sales did not violate the second element of the statute, *i.e.* they were not made at such prices for the purpose of destroying competition or eliminating a competitor. On the other hand, the concept of "unreasonably low" prices may call for broadening the focus to cover the element of predatory purpose and may include such factors as the reasons why a low price was adopted, the expected period for which such price will be in effect, and its probable or intended impact upon competition. But the Court need not concern itself with those analytical questions in the present case. Under either analysis the prohibition in Section 3 against selling at unreasonably low prices for the purpose of destroying competition covers sales below cost when made for such purpose.

2. The whole history of antitrust law confirms our reading of Section 3. Selling below cost, on the part

of large firms, has long been recognized both by the courts and by Congress as a particularly effective—and hence a particularly pernicious—method of destroying competition. In one of the landmark early Sherman Act cases, *United States* v. *American Tobacco Co.*, 221 U.S. 106, 160–161, this Court held that an inference that the company had intended to monopolize was justified by the fact, among others, that it had initiated price wars in which it sold below cost, "[a]s a result of [which] it sustained severe losses * * *." See, also, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 807. Similarly in *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y.), another early Sherman Act case, District Judge Learned Hand rested his conclusion that there was an illegal combination which had attempted "to drive out weaker competitors" (p. 1013) on the fact, among others, that the principal defendant had sold below cost (pp. 989–990). See, also, *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237 (C.A. 2), holding that a seller violated Section 2(a) of the original Clayton Act by selling below cost in a particular market, pursuant to a "design and plan to put [its competitor there] out of business," using "some real or fancied wrong * * * as an excuse to proceed against and eliminate a weaker competitor."

When Congress passed the original Clayton Act in 1914, it, too, recognized that selling below cost should be prohibited as a dangerous device for destroying competition. The House Committee report on the

Act stated (H. Rep. 627, 63d Cong., 2d sess., p. 8, emphasis added):

> Section 2 of the bill * * * is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns * * * have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling * * * at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country * * *. In the past it has been a most common practice of great and powerful combinations engaged in commerce * * * to lower prices of their commodities, *oftentimes below the cost of production,* in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors * * *.

The 1936 Robinson-Patman amendments were designed to "strengthen the Clayton Act provisions" (*Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 543–544). This Court has stated, in a case based in part upon Section 3 of the Robinson-Patman Act, that "Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business" through predatory price-cutting by which "[t]he profits made in interstate activities would underwrite the losses of local price-cutting campaigns." *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 119, 120. The indictment in this case charges precisely such predatory conduct. It alleges that National is engaged in the milk business "throughout the

United States" (R. 1); that it sold below cost in seven specified markets for the purpose of destroying competition in each of those markets (R. 9, 12, 15–16, 19, 22, 28–29, 32); and that it "finance[d] and subsidize[d]" its "price war[s] against small dairies selling milk in competition with it" through its operations "in a great many different geographical localities" (*ibid.*). Plainly, such sales below cost were at "unreasonably low prices," as that phrase is used in Section 3 of the Robinson-Patman Act.

3. The view that predatory sales below cost are prohibited by Section 3 is further supported by the legislative history of the Robinson-Patman Act itself. One of the chief aims of the legislation was to strengthen, and thus to make more effective, the various prohibitions of the Clayton Act on geographic price discrimination, including the ban on predatory selling below cost. S. Rep. 1502, 74th Cong., 2d sess., p. 4; 80 Cong. Rec. 3112, 3113, 6332, 9416; cf. *id.* at 6346. As originally introduced in both the House and Senate, the bill that became the Robinson-Patman Act did not contain the provisions of Section 3. H.R. 8442, S. 3154, 74th Cong., 2d sess. That section first appeared as part of a Senate bill (S. 4171), introduced by Senators Borah and Van Nuys, and proposed by Senator Borah as an amendment to the original House bill (80 Cong. Rec. 6348).[4]

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[4] The Borah-Van Nuys bill appears to have been largely copied from the Canadian price discrimination law, Can. Rev. Stat. c. 314, § 33A, enacted in 1935 as Section 498A (later Section 412) of the Criminal Code, 25–26 Geo. V. c. 56, § 9. See Hearings on S. 4171 Before a Subcommittee of the Senate Judiciary Committee, 74th Cong., 2d sess., p. 63. Although

The Senate held hearings on the Borah-Van Nuys bill. While those hearings were primarily concerned with price discrimination, there was also testimony relating to sales below cost made with the objective of driving competitors out of business or otherwise injuring competition. Hearings on S. 4171 Before a Subcommittee of the Senate Judiciary Committee, 74th Cong., 2d sess., pp. 14, 18, 64, 85–86. Senator Borah himself stated that his bill was intended "to stop" "selling at less than cost." *Id.*, p. 53. The Senate passed the original House Bill with the Borah-Van Nuys amendment (80 Cong. Rec. 6436) and the Conference Committee adopted the amendment as Section 3 of the Act (H. Rep. 2951, 74th Cong., 2d sess.). Thus the legislative history shows that, although Congress did not focus primarily on sales below cost during its consideration of the Robinson-Patman Act, it consciously dealt with this specific problem.[5]

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the law was upheld, *Att'y Gen. for B.C.* v. *Att'y Gen. for Can.*, [1937] A.C. 368 (P.C.), as a constitutional exercise of Dominion power under the federal-provincial jurisdictional allocation of the British North America Act, 30–31 Vict. c. 3, Canadian experience with the "unreasonably low prices" clause has been limited. We know of only two prosecutions brought under the clause, in both of which the defendants were acquitted on the merits. *R.* v. *Ray* (Police Ct., South Burnaby, B.C., December 11, 1957, unreported); *R.* v. *Howard* (Police Ct., South Burnaby, B.C., March 19, 1958, unreported). In neither opinion does it appear that the statute was challenged as vague and indefinite, although the Canadian courts have the power to refuse enforcement to statutes too vague to be properly enforced. See, *e.g.*, *Lethbridge* v. *Northern Trusts Co.*, [1925] D.L.R. 422 (Sup. Ct. App. Div. Alberta).

[5] In the *Nashville* case (355 U.S. at 382), the Court referred to an explanatory statement concerning Section 3 made

In sum, the words of Section 3, read against the background of antitrust history and in the light of the evidence of specific legislative concern with sales below cost, make it plain that sales below cost made for the purpose of destroying competition fall within the category of sales at unreasonably low prices proscribed by the legislation.

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by Representative Patman, in testifying in 1950 before a Congressional Committee, as "noteworthy, by way of epitomizing the conclusions to be drawn from the legislative history * * *." In the present case, a recent statement by Representative Patman before a Congressional Committee similarly confirms the view that Section 3 covers predatory sales below cost.

In 1960 Representative Patman introduced one of twenty-six identical bills (H.R. 10235, 86th Cong., 2d sess.) to amend the Federal Trade Commission Act explicitly to make certain of the acts prohibited by Section 3 unfair competitive practices within the meaning of Section 5 of the Trade Commission Act, and to provide a private right of action for damages and injunctive relief based on such practices. Among those practices is the sale of "goods at unreasonably low prices * * * where the effect of such sale may be * * * to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such unreasonably low prices." The bill further defines a sale at an unreasonably low price to "include any sale * * * at a price below cost as such term is defined by the law" of the state in which the product is to be consumed, or, if no such law is applicable, at a price below fully-distributed cost.

In hearings on the bill (Hearings on H.R. 10235 Before a Subcommittee of the House Interstate and Foreign Commerce Committee, 86th Cong., 2d sess.), Rep. Patman stated (p. 15) that his bill was designed to supply a private right of action for damages for violations of Section 3 which this Court in *Nashville Milk*, *supra*, held non-existent: that the *Nashville* holding had denied "small and independent business concerns" the right "to use Section 3 * * * in proceedings against unlawful selling at unreasonably low prices—even at prices below cost * * *" (p. 9): and that below-cost selling "appear[s] to

B. AS APPLIED TO SALES BELOW COST FOR THE PURPOSE OF DESTROYING COMPETITION, SECTION 3 IS NOT UNCONSTITUTIONALLY VAGUE OR INDEFINITE

1. The constitutional requirement of definiteness in criminal statutes serves two purposes: (1) it insures that persons will be given adequate warning of what conduct is criminal and thus enable them to conform their behavior to the requirements of the law; and (2) it provides juries and judges with adequate standards for identifying the proscribed conduct and imposing criminal sanctions according to rule. *Boyce Motor Lines, Inc.* v. *United States,* 342 U.S. 337, 340; *United States* v. *Petrillo,* 332 U.S. 1, 7; *United States* v. *Ragen,* 314 U.S. 513, 524; *Sproles* v. *Binford,* 286 U.S. 374, 393.

Legislatures necessarily use generic and inclusive terms to cover categories of proscribed behavior. The general terms must then be interpreted and applied both by the persons regulated and by the enforcing tribunals. Such a limitation inheres in language itself. It would be futile for the legislature to try to predict and describe multifarious specific situations; any such attempt is doomed to failure or would inevitably lead, by omission or evasion, to greater arbitrariness. The constitutional requirement is merely that there be a "reasonable degree of certainty." *Boyce Motor Lines, Inc.,* v. *United States, supra,* 342 U.S. at 340; *Winters* v. *New York,* 333 U.S. 507, 524–

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be in violation of Section 3 * * * *" (p. 10). Rep. Patman described his bill as "contain[ing] an example of some things included within the term 'unreasonably low prices,' namely, sales below cost," a term which was "first used" in Section 3, "which * * * contains no example nor definition of the term" (p. 31).

526 (Mr. Justice Frankfurter, dissenting). There will always remain some uncertainty to be resolved by the judgment of judge or jury. But, as Mr. Justice Holmes stated, in upholding the constitutionality of criminal penalties for violation of the Sherman Act's prohibition of unreasonable restraints of trade, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death." *Nash* v. *United States,* 229 U.S. 373, 377.

This Court's decisions applying the constitutional requirement of definiteness express the governing criteria. The terms of a statute are appraised for amenability to the "ready comprehension" of the persons affected and the tribunal, *United States* v. *Ragen,* 314 U.S. 513, 524, and for "susceptib[ility to] objective measurement," *Cramp* v. *Board,* No. 72, this Term, decided December 11, 1961, slip opinion, p. 8. The law is viewed as explained by "common usage and understanding" and "common experience," including the background and objectives of the particular prohibition, and the experience under it. *Boyce Motor Lines, Inc.* v. *United States,* 342 U.S. 337, 340–342, quoting *Sproles* v. *Binford,* 286 U.S. 374, 393; *United States* v. *Ragen, supra.* Common law tradition may remove undue ambiguity. See *Nash* v. *United States, supra,* 229 U.S. at 377. It is significant, in support of the statute, that "[c]learer and more precise language" cannot be posed which would achieve

the valid legislative purpose. *United States* v. *Petrillo*, 332 U.S. 1, 7. A statute is ordinarily not invalid merely because it may require a person to desist from some possibly lawful conduct in order to assure his compliance with the law, since it is not unfair "to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340.[6] The constitution is satisfied if the words do not "become a trap for those who act in good faith" and provides "a practical guide to permissible conduct." *United States* v. *Ragen*, 314 U.S. 513, 523, 524.

2. We submit that under these criteria Section 3, as here applied to sales below cost, is clearly valid. Congress was dealing with an evil which has appeared in many contexts and for which general prohibitory language was therefore appropriate. Cf. *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 453. The evil was predatory price-cutting by companies with widespread interests and great market power, concerns which could subsidize a price war against a smaller competitor in a limited market. As already noted, *supra*, pp. 12–17, the clearest case was continued selling at a loss, not justified by market circumstances and with predatory intent.[7]

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[6] A higher degree of definiteness may be required where the lawful conduct that might be deterred by the statute involves rights protected by the First Amendment. *Cramp* v. *Board*, *supra*, p. 10; *Smith* v. *California*, 361 U.S. 147, 151. See *infra*, pp. 34–35.

[7] Although this case presents only the application of Section 3 to sales below cost, we believe that the statute was properly framed in terms of "unreasonably low prices." Experience

Section 3 gave appellees adequate warning that, if they sold below cost for the purpose of destroying competition, they were violating the prohibition against selling at unreasonably low prices for that purpose. "[C]ommon usage and understanding" (*Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340–341) are enough to inform the management of a business that selling at a loss constitutes selling at unreasonably low prices unless there are abnormal business circumstances which justify the losing operations. Section 3 gives plain evidence that the purpose to destroy competition is not a justification, but rather is the heart of the violation. Thus, the avoidance of this plain violation of Section 3 was not beyond the "ready comprehension" (*United States* v. *Ragen*, 314 U.S. 513, 524) of National's management. All it had to do was to sell above cost, a normal business objective, or to justify losses by business exigencies other than the wish to injure competitors.

Determining appellees' guilt or innocence under the statute will be easily within the competence of judge and jury. Common understanding, together with prior experience in cases dealing with predatory price-cutting under other statutes, demonstrate that "sales below cost" and the possible justifications therefor are susceptible to judicial proof, just as they are to a businessman's knowledge.

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had shown that, in some circumstances, sales at or above cost could be found to be unreasonably low if made with a predatory purpose. See, *e.g.*, *United States* v. *Corn Products Refining Co.*, 234 Fed. 963, 1010–11 (S.D.N.Y.). It is difficult to see how a "more precise" standard could have been written. Cf. *United States* v. *Petrillo*, 332 U.S. 1. See *infra*, note 8, pp. 22–23.

Business accounts are kept to measure the profit and loss of operations vis-a-vis costs. The corporate books themselves are likely to be important evidence in showing that sales were made below cost. Here, the charge is that National "intentionally" sold below its cost. The indictment itself suggests, therefore, that proof will be taken from corporate documents of which National had specific knowledge. The same proof was relied on by Judge Learned Hand in *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y.), in upholding in a Sherman Act civil case a charge of selling at unreasonably low prices with a predatory purpose. In that case, the corporate accounts (p. 990) were supplemented by intracorporate communications showing management's contemporaneous understanding (p. 989), historic industry pricing patterns (pp. 988–989), and the expert opinion of those familiar with the industry (p. 991). Similarly, in upholding the constitutionality of Section 3, Judge Yankwich (who has had extensive experience assessing evidence in antitrust cases) pointed out that the problems of proof of cost, as well as of other pertinent factors, could be resolved by using "ordinary business and accountancy methods." *F. & A. Ice Cream Co.* v. *Arden Farms Co.*, 98 F. Supp. 180, 189 (S.D. Cal.).[8]

[8] Indeed, Judge Yankwich believed that no insurmountable or unfamiliar problem would be presented by the statutory standard of "unreasonably low" even when applied to sales above cost made with the purpose of destroying competition. In his view, the usual case would involve a "sudden and unexpected change of price" in which cost and the market circumstances would show the reasonableness of the price and the

The Federal Trade Commission has experienced no great difficulty in assessing the evidence and upholding charges of sales below cost with predatory intent as unfair competitive practices under Section 5 of the Federal Trade Commission Act. *E. B. Muller & Co.* v. *Federal Trade Commission*, 142 F. 2d 511 (C.A. 6); *Blackwell Journal Pub. Co.*, 23 F.T.C. 413; *Lock Joint Pipe Co.*, 27 F.T.C. 709. Defendants indicted for selling below cost under the unreasonably low price provision of Section 3 have been sufficiently aware of the meaning of such a charge to plead guilty, *United States* v. *Fairmont Foods Co.* (Crim. 3634, W.D. Mich., June 23, 1959, unreported), and *nolo contendere*, *United States* v. *Safeway Stores, Inc.* (Crim. 9584, N.D. Tex., June 18, 1957, unreported) (see 20 F.R.D. 451, accepting the defendants' plea).

Moreover, defendants in other antitrust cases apparently have anticipated no difficulty in obeying a prohibition on selling below cost for the purpose of destroying competition, since they have signed consent decrees containing such a prohibition, both

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intent of the defendant. 98 F. Supp. at 189–190.

The Canadian experience similarly indicates the workability of the standards established by Section 3. The Restrictive Trade Practices Commission, in investigating certain allegations of unreasonably low prices violating the statute on which Section 3 was modeled, see *supra*, note 4, has displayed no difficulty in assessing evidence of costs and average profit margins for the industry in general and the investigated firm in particular (respecting both the low-priced products and others marketed in a similar manner). *Report Concerning the Wholesale Trade in Cigarettes and Confectionery in the Edmonton District*, pp. 53–60.

in suits brought by the United States under the Sherman Act (*e.g., United States* v. *Safeway Stores, Inc.*, 1957 Trade Cas. ¶ 68,871 at 73,531 (N.D. Tex.); *United States* v. *Polk & Co.*, 1955 Trade Cas. ¶ 67,993 at 70,226–27 (E.D. Mich.); *United States* v. *Western Newspaper Union*, 1960 Trade Cas. ¶ 69,709 at 76,791 (S.D.N.Y.)), and in administrative proceedings brought by the Federal Trade Commission (*e.g., Noma Electric Corp.*, 15 F.T.C. 87; *Kaumagraph Co.*, 20 F.T.C. 1).[9]

3. The decisions of this Court which have upheld, as against the charge of unconstitutional vagueness, other statutes containing terms of no greater specificity than Section 3, fully support its constitutionality.

Thus, the Court has often held that the use of such terms as "reasonable" or "unreasonable" does not, of itself, made a statute unconstitutionally vague. In *United States* v. *Ragen*, 314 U.S. 513, 523, the Court said "[t]he mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." In that case, the Court upheld a conviction for willfully attempting to evade income taxes through making business deductions

[9] Indeed, a number of defendants in Sherman Act cases have consented to provisions enjoining them—in the very terms of Section 3—from selling at unreasonably low prices for the purpose of destroying competition. *E.g., United States* v. *Safeway Stores, Inc., supra; United States* v. *Western Newspaper Union, supra; United States* v. *Libby-Owens-Ford Glass Co.*, 1948–49 Trade Cas. ¶ 62,323 at 62,805 (N.D. Ohio); *United States* v. *A. B. Dick Co., id.*, ¶ 62,233 at 62,358 (N.D. Ohio).

in excess of the "reasonable" allowances for salaries and compensation which the Internal Revenue Code authorized. The Court ruled that the statutory standard was understandable in the light of experience and common sense to persons acting in good faith, and was actually obeyed without confusion by taxpayers generally. Particularly pertinent is *Nash* v. *United States*, 229 U.S. 373, in which the Court upheld a conviction for conspiracy in restraint of trade and to monopolize in violation of the Sherman Act. Defendant contended that the statute was indefinite, because the Rule of Reason introduced "an element of degree as to which estimates may differ", and that "criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable" (p. 377). The Court rejected his contention and Mr. Justice Holmes pointed out, in the passage quoted *supra*, pp. 18–19, that such judgments, especially in close cases, are often crucial in the criminal law.

Similarly, a conviction under a state antitrust law prohibiting contracts and arrangements "reasonably calculated" to fix prices, was upheld against a charge of vagueness. *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U.S. 86, 109. The Court upheld a regulation prohibiting utilities from including more than "reasonable" charges in specified statements of account, violation of which was a criminal offense, on the ground that the term was amplified by the "context" of "good morals" and the well-known evils against which it was directed. *American Tel. & Tel. Co.* v. *United States*, 299 U.S. 232, 246. And no substantial federal question was presented by state convictions for driving at an

"unreasonable" speed. *Ratner* v. *California*, 321 U.S. 755; cf. *Miller* v. *Oregon*, 273 U.S. 657.[10]

In other cases this Court has upheld, as sufficiently definite, standards of criminality framed in general terms of no greater specificity than reasonableness. In *United States* v. *Petrillo*, 332 U.S. 1, the Court upheld a statute prohibiting coercion of employers to hire persons "in excess of the number * * * needed * * * to perform actual services" (p. 3). It recognized that there were "many factors that might be considered in determining how many employees are needed on a job," including but not limited to "an employer's statements as to the number of employees needed * * *" (p. 6). Only last Term the court sustained a criminal Sunday closing law, which exempted sales of "merchandise essential to, or customarily sold at, or incidental to, the operation of" certain recreational enterprises. *McGowan* v. *Maryland*, 366 U.S. 420. The Court pointed out that the applicability of the phrase could be easily comprehended by resort to "ordinary commercial knowledge" and the results obtainable from "a reasonable investigation" into the activities of "nearby" exempted business (p. 428). In

[10] See also *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, which upheld a prohibition of "unreasonable" waste of natural gas enforceable by injunction, and found that the standard was sufficiently explained by conditions in the petroleum industry and matters of science and common knowledge. Lower courts have sustained the constitutionality of federal criminal statutes which penalized trading with one whom the defendant had "reasonable" cause to believe was an enemy of the United States, *United States* v. *Leiner*, 143 F. 2d 298 (C.A. 2) and which, as interpreted, prohibited the packaging of food under conditions allowing a "reasonable" possibility of contamination, *Berger* v. *United States*, 200 F. 2d 818 (C.A. 8).

Boyce Motor Lines, Inc. v. *United States*, 342 U.S. 337, the Court upheld a criminal conviction for violation of an Interstate Commerce Commission order which prohibited, "so far as practicable, and where feasible," the transportation of explosives and poisonous gas "through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings" (p. 339); the relevant factors in determining guilt were the comparative merits of other routes as "both commercially practicable and appreciably safer" (p. 342). In *Sproles* v. *Binford*, 286 U.S. 374, 380, a state statute was upheld which exempted from limits on truck length and weight any vehicles used to transport shipments "by the shortest practicable route" from point of origin to a shipping terminal, since the phrase was given meaning by "common usage and understanding." In *United States* v. *Spector*, 343 U.S. 169, 170-171, the "statutory setting" revealed the meaning, under a law penalizing wilful failure or refusal of an alien subject to a deportation order "to make timely application in good faith for travel or other documents necessary to his departure," of the words "timely" and "necessary."

Appellants rely primarily (Motion to Dismiss or Affirm, pp. 5-6) upon *United States* v. *Cohen Grocery Co.*, 255 U.S. 81. There this Court held unconstitutionally vague the provision of the Lever Anti-Profiteering Act making it "unlawful * * * wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" (p. 86). The Court stated (pp. 89-90) that the statute "forbids no specific or definite act" and leaves open "the widest

conceivable inquiry, the scope of which no one can foresee"; and that "to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." The Court also pointed out that the uncertainty of the statute was "vividly portrayed" by the "conflicting results" reached in a series of lower court cases construing it.

The vice of that statute (and of comparable statutes invalidated in the other cases upon which appellees rely, such as *Cline* v. *Frink Dairy Co.*, 274 U.S. 445) was not its use of the "reasonableness" standard as such, but its failure to relate this standard to any more precise rules of conduct discernible from either the legislative or historical background of the legislation or the common understanding of persons to whom it applied.[11] In other words, the statute in *Cohen* provided no meaningful standard at all as to what was prohibited. There was no way of knowing whether the Act sought to ban unreasonably high or unreasonably low prices, or discriminatory prices. There was no background or legislative policy to sup-

[11] There was the same defect in the statute invalidated in the *Cline* case. The Court struck down a state antitrust law exempting restraints of trade without which a "reasonable profit" could not be made. Under that act a businessman was required not merely to guess at the meaning of "reasonable profit"—a phrase, like that in *Cohen*, presumably prescribing maximum and not minimum prices—but also to hypothesize on the possibility of its attainment if the restraint were absent. No such necessity for divining the future is involved here; moreover, the standard in *Cline*, as in *Cohen*, did not have a clearly defined core of meaning similar to cost under Section 3.

ply standards of reasonableness. Nor did the statute impose any requirement of a particular intent that might serve to give definiteness to an otherwise vague criterion.

This Court's decision in *United States* v. *Ragen*, 314 U.S. 513, shows that the *Cohen* case affords no basis for invalidating the prohibition in Section 3 on selling at unreasonably low prices for the purpose of destroying competition. In *Ragen* (*supra*, pp. 24–25), the court upheld the statutory prohibition on making business deductions in excess of "reasonable" allowances for salaries and compensation. The court distinguished the *Cohen* case, on which the court of appeals had relied, on the ground that "[n]o such unworkable standards are involved here" (p. 523), since the "acts of bad faith" condemned by the statute "are not beyond the ready comprehension either of persons affected by the act or of juries called upon to determine violations * * *" (p. 524). It pointed out (*ibid.*) that for many years thousands of corporations have filed income tax returns without "any apparent general confusion" as to the meaning of deductions for "reasonable" allowances for salaries and compensation, and it concluded (*ibid.*): "A finding of unconstitutional uncertainty in this section of the act, as applied here, would be a negation of experience and common sense." In the present case, involving a standard that is at least as precise as that in *Ragen*, similar considerations support the validity of Section 3 "as applied here."

3. We have already shown that common understanding and past experience demonstrate the worka-

bility of the Section 3 standard, as applied to prices below cost, *supra*, pp. 20–24. But any possible constitutional doubt as to whether, as applied to sales below cost, the prohibition in Section 3 on selling at unreasonably low prices is sufficiently definite, is dispelled by the fact that such sales are criminal only if made with the purpose of destroying competition or eliminating a competitor.

In *Screws* v. *United States*, 325 U.S. 91, 101–102, Mr. Justice Douglas, in an opinion in which three other members of the Court joined, pointed out:

> The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. See *United States* v. *Cohen Grocery Co.*, *supra*. But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware. * * *

See, also, *United States* v. *Classic*, 313 U.S. 299, where a statute making it a crime for one who, acting under color of law, "willfully subjects * * * any inhabitant of any State * * * to the deprivation of any rights, privileges or immunities secured and protected by the Constitution and laws of the United States" (p. 325), was held not unduly vague because its application "is restricted by its terms to deprivations which are *willfully* inflicted" (p. 329) (emphasis added); *Williams* v. *United States*, 341 U.S. 97; *Koehler* v. *United States*, 342 U.S. 852 (Mr. Justice Jackson, dissenting from the denial of certiorari).

The reason for this principle is plain. While a person should not be subjected to criminal punishment for violating a statutory standard so vague that he cannot know whether he is committing a crime, one who acts for the purpose of accomplishing the very thing which the statute prohibits cannot claim that he was insufficiently warned that his conduct was illegal.

The Court has frequently relied upon the requirement of a specific purpose or intent to save a statute from unconstitutional vagueness. Thus, in *Gorin* v. *United States*, 312 U.S. 19, a statute prohibiting the transmittal to a foreign power of information "connected with or relating to" the national defense was sustained because of the requirement that the transmittor must have known that the information would be used to the detriment of the United States. Similarly, in *United States* v. *Ragen*, 314 U.S. 513, 524, a statute making criminal tax evasion accomplished by the deduction of more than "reasonable" business ex-

penses was held sufficiently definite because of the element of willfulness in tax evasion, since "[a] mind intent upon willful evasion is inconsistent with surprised innocence." See, also, *American Tel. & Tel. Co.* v. *United States*, 299 U.S. 232; *United States* v. *Petrillo*, 332 U.S. 1; *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 327; *United States* v. *Spector*, 343 U.S. 169.

In the present case, "the requirement of a specific intent to do a prohibited act"—the purpose to destroy competition that accompanied the sales below cost—"relieve[s] the statute of [any] objection that it punishes without warning an offense of which the accused was unaware". Appellees are charged with intentionally selling below cost for the specific predatory purpose condemned by the statute; "certainly [they] are in no position to say that they have no adequate advance notice that they would be visited with punishment" (*Screws, supra*, 325 U.S. at 105).

II

SINCE SECTION 3 IS CONSTITUTIONAL AS APPLIED TO THE SALES CHARGED IN THIS INDICTMENT, THERE IS NO OCCASION FOR THE COURT TO CONSIDER ITS CONSTITUTIONALITY AS APPLIED TO OTHER SITUATIONS

There is no occasion for this Court to consider the constitutionality of Section 3 in any factual situation other than that involved in this case. A litigant may challenge the constitutionality of a statute only in its application to him, and in the present case Section 3 is sought to be applied only to National's sales below cost for the purpose of destroying competition.

This Court has repeatedly restricted its decision of constitutional questions to the particular facts in the

particular case before it, and has refused to determine the general validity of statutory provisions in the abstract, on the basis of their possible application to other situations. Since "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases [that may be] imagined" (*United States* v. *Raines*, 362 U.S. 17, 22), "[i]t has long been [this Court's] considered practice not * * * to decide any constitutional question except with reference to the particular facts to which it is to be applied." *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89–90. If the statute is constitutional as applied,—and, as we have shown in Point I, it plainly is—the Court will not look beyond to peripheral cases which may pose more difficult constitutional problems. *Robinson* v. *United States*, 324 U.S. 282; *United States* v. *Fruehauf*, 365 U.S. 146, 157; *Barrows* v. *Jackson*, 346 U.S. 249, 257; *United States* v. *Harriss*, 347 U.S. 612, 618. An example of the application of this principle is the *United Public Workers* case, *supra*. There this Court upheld the prohibition in the Hatch Act against taking "any active part in political management or in political campaigns," as applied to the clear case of a ward executive committeeman and worker at the polls, but expressly refused to examine any further at that time into the validity of the general standard.

The present case presents an equally compelling occasion for the application of the rule. The indictment charged that National had sold below cost for the predatory purpose condemned by the statute,

and, as we have demonstrated, the Act is constitutional as applied to such sales. Appellees' contention (Motion to Dismiss or Affirm, pp. 3–4, 9) that the statute is invalid "on its face" is merely an attempt to argue the constitutional question on the basis of hypothetical situations that are not here presented. For to say that a statute is invalid "on its face" is but another way of saying that the constitutional question should be decided in the abstract, without regard to the particular facts in the particular case. A decision on that basis, however, would be in disregard of the settled limitations which this Court customarily imposes in constitutional cases.

Cases such as *Thornhill* v. *Alabama*, 310 U.S. 88, and *United States* v. *Petrillo*, 332 U.S. 1, do not involve any departure from this principle. For in each of those cases the indictment was drawn in the words of the statute, and the Court, in determining the constitutionality of the enactment as applied to the conduct charged in the indictment, had nothing more to go on than the "face" of the legislation. In the present case, however, the indictment did not merely charge National with selling at unreasonably low prices, but specified that such prices were below cost, that the sales were subsidized by National's operations in other markets, and that they constituted a price war against National's smaller competitors conducted for the purpose of destroying competition.

In *Thornhill*, moreover, the Court was dealing with a statute "sweep[ing] within its ambit * * * activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press," 310 U.S. at

97. In the delicate area of the First Amendment, the mere existence of a broad prohibitory statute may itself have an inhibiting effect on the exercise of protected rights (pp. 97–98). The present case involves no questions of individual liberty under the First Amendment, and, unlike *Thornhill*, "[w]here regulations of the liberty of free discussion [were] concerned, there are [no] special reasons" here for broadening the scope of constitutional adjudication (p. 98). Section 3 of the Robinson-Patman Act imposes no limitations on the "exercise of individual freedoms affirmatively protected by the Constitution" (*Cramp* v. *Board*, No. 72, this Term, decided December 11, 1961, slip opinion, p. 10), and there is accordingly no occasion for this Court to consider the constitutional issue in the light of other situations to which "the statute has not been, and might never be, applied * * *." *United States* v. *Petrillo*, 332 U.S. 1, 11.

CONCLUSION

The judgment of the district court dismissing counts 2, 4, 6, 8, 10, 13, and 15 should be reversed.

Respectfully submitted.

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